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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID S. HESS, MOTORCITY OF JACKSONVILLE, LTD., AND MOTORCITY OF JACKSONVILLE, INC.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SOUTHEAST BANK, N.A., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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December 18, 1997

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QUESTION PRESENTED

Whether the court of appeals erred in holding that an "evolving" federal common law D'Oench doctrine can continue to be applied today to bar unquestionably proper state law claims against a failed thrift held in receivership by the FDIC, where the claims do not involve any assets of the thrift.

PARTIES

In addition to the named parties to this proceeding, other respondents include Southeast Bank, N.A. and David Feigenbaum.

LIST PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following:

Motorcity of Jacksonville, Ltd. and Motorcity of Jacksonville, Inc. have no parent companies or subsidiaries.

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IN THE
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DAVID S. HESS, MOTORCITY OF JACKSONVILLE, LTD.,
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FEDERAL DEPOSIT INSURANCE CORPORATION
AS RECEIVER FOR SOUTHEAST BANK, N.A., et al.,
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Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit sitting en banc after remand from this Court was issued on August 20, 1997; is reported at 120 F.3d 1140; and is reproduced in the Appendix at 1a-10a, infra. The previous opinion of the court of appeals sitting en banc was issued on May 8, 1996, and is reported at 83 F.3d 1317 (11th Cir. 1996). No. 96-106 Pet. App. 1a-55a.[1] The panel opinion of the Eleventh Circuit was issued December 5, 1994, and is reported at 39 F.3d 292 (11th Cir. 1994). No. 96-106 Pet. App. 56a-73a. The initial Order of the United States District Court for the Southern District of Florida dismissing petitioners' complaint was issued on November 25, 1992 and is included in No. 96-106 Pet. App. at 76a-83a; a second order denying petitioners' motion for rehearing and for leave to amend their complaint was issued on May 10, 1993. No. 96-106 Pet. App. 74a-75a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on August 20, 1997. On November 5, 1997, Justice Kennedy extended the time for filing this petition to and including December 18, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1823(e)(1) of the Financial Institutions Reform,

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[1] Because the prior opinions were reproduced in the first petition for certiorari filed by Hess, the Clerk's office authorized the lodging of ten copies of that appendix in lieu of reprinting those materials. References to that set of appendices will be to "No. 96-106 Pet. App. __a".

Recovery, and Enforcement Act of 1982 ("FIRREA") provides:

> No agreement which tends to diminish or defeat the interest of the [Federal Deposit Insurance Corporation (FDIC)] in any asset acquired by it under this section or section 1821 of this tile, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement --
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1821(d)(9)(A) provides:

> [A]ny agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC].

12 U.S.C. § 1821(d)(2)(H) provides:

> The [FDIC], as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter.

STATEMENT OF THE CASE

Since this case was last before the Court about one year ago, the then-acknowledged conflict between the Eleventh Circuit in this case and other circuits concerning the continuing vitality of an "evolving" D'Oench doctrine[2] based on federal common law principles has widened and deepened. Thus, in addition to the Eighth and D.C. Circuits, the Ninth Circuit has now expressly rejected the holding of the Eleventh Circuit in this case. On the other hand, the Fourth Circuit has expressed its agreement with the Eleventh Circuit. Moreover, the Eleventh Circuit's decision again was rendered en banc and that court categorically rejected the FDIC's efforts to use FIRREA to bolster the Court's D'Oench holding. Thus, the Eleventh Circuit's most recent pronouncements eliminate any realistic prospect that the extraordinary division among the Circuits can be resolved without intervention by this Court.

Under ordinary circumstances the disarray in the law embodied in the disparate decisions of the courts of appeals would be more than sufficient to justify certiorari. Indeed, in an earlier era, a less severe conflict concerning the role of the common law under FIRREA was more than sufficient to persuade the Solicitor General to acquiesce as a respondent in a grant of certiorari. See Brief of the FDIC on petition for writ

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[2] D'Oench, Duhme & Co., v. FDIC, 315 U.S. 447 (1942).

of certiorari, O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) (where the government acquiesced on a similar issue with merely a split between the Fifth and Ninth Circuits). In the wake of O'Melveny and Atherton v. FDIC, 117 S. Ct. 666 (1997), the federal government has become demonstrably less comfortable defending in this Court the litigating positions it successfully advances in the courts of appeals. For instance, in response to Hess's previous petition, the Solicitor General went to extraordinary lengths to avoid plenary review by this Court, notwithstanding the unquestionable need for some measure of uniformity on the question of the status of D'Oench. If anything, the need for guidance has increased since the prior petition was filed and thus the Court should grant this petition now and finally resolve the fate of D'Oench and its still-evolving doctrine.

FACTUAL BACKGROUND

This case arises out of unchallenged allegations that a Florida bank breached its promise and tortiously and directly caused the failure of petitioner David S. Hess's business at a cost of $1.4 million.[3] In 1986, Hess, along with his brother, first explored the possibility of a new kind of automobile business -- a used car dealership that had modern, upscale services and facilities similar to those of a new car dealership. No. 96-106 Pet. App. 85a (photograph).

As a cardiologist, Hess had been a longstanding customer of the Jacksonville office of respondent Southeast Bank, N.A., in whose place the FDIC now stands as a receiver. Hess negotiated with Southeast's Jacksonville office regarding

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[3] The facts as stated in this petition are taken largely from the Eleventh Circuit's decision and from the allegations in petitioners' Amended Complaints, all of which are assumed true on appeal from a motion to dismiss.

financing for the car dealership, and this office provided all the financing needed except the "floor-plan financing" necessary for ongoing inventory purchases. For floor-plan financing, the Jacksonville office referred Hess to Southeast's Miami office, which, he was told, had the necessary expertise in this specialized financing.

Southeast's Miami office showed great interest in providing floor-plan financing for Hess's business, which was named Motorcity. A Southeast officer, David Feigenbaum, informed Hess that Southeast had handled the Miami floor plan for the largest car dealership in the country. Hess made it clear that he and his brother were inexperienced and would be absentee owners, busy with their professional practices. Southeast and Hess discussed the importance of preventing a problem unique to financing the inventory of a car dealership -- "out-of-trust" sales. (As each car was sold, Motorcity was obligated to repay to Southeast the portion of the loan designated for that particular car, plus interest. Failure to repay the loan after each car is sold renders the sale "out of trust.") Southeast represented that it would conduct periodic audits and contact Hess immediately upon discovering any out-of-trust sales.

In April 1987, Southeast issued a commitment letter of credit not to exceed $750,000, with $375,000 of collateral in the form of a certificate of deposit. Two months later, Motorcity and Southeast executed a floor-plan financing agreement.

Motorcity opened for business in September 1987. Shortly thereafter, Southeast began conducting monthly audits of the dealership's floor plan through an independent auditor. According to Southeast's own documents, it quickly learned that numerous out-of-trust sales were occurring and that these

sales could result in the closure of Motorcity. In breach of its promise, nobody at Southeast ever informed Hess about this precarious situation.

Southeast did contact Hess about other irregularities, all of which Hess addressed. For example, after being notified by Southeast, Hess corrected a discrepancy between the book value and the price paid by the dealership for a vehicle. Southeast even recommended that Motorcity hire certain employees, and Motorcity followed those recommendations.

In 1988, Southeast compounded its breach by extending Motorcity's credit, while telling Hess that additional credit was necessary only because of the size of the inventory. In fact, it was the out-of-trust sales that made the extension appear to be necessary. Feigenbaum even telephoned Hess on several occasions to report that Southeast had received "good" floor-plan reports.

In early 1989, a newly hired general manager at Motorcity informed Hess that the dealership was "out of trust" more than $400,000. Virtually the entire time Southeast had audited Motorcity, the previous managers of Motorcity had engaged in out-of-trust sales, diverting the money to pay substantial bonuses to themselves. Hess immediately notified Southeast. Southeast's response was to send Feigenbaum to Jacksonville to inspect the inventory. Feigenbaum's inspection confirmed what Southeast's documents already revealed -- there were significant out-of-trust sales -- and showed, moreover, that the out-of-trust amount might exceed the collateral. Accordingly, Southeast demanded payment, and in February 1989, Southeast seized control of Motorcity's bank accounts, vehicles, and titles, shut down the floor plan, and exercised control over the sale of all vehicles at Motorcity.

PROCEDURAL BACKGROUND

As the FDIC concedes, by April 30, 1990, Hess had fully repaid every obligation owed to Southeast associated with the Motorcity financing. Thereafter, in October 1990, petitioners filed this action against Southeast in Florida state court, alleging breach of oral agreement, breach of fiduciary duty, and negligence. That complaint withstood the defendants' motion to dismiss under state law and discovery was proceeding. No. 96-106 Pet. App. 84a. A year after the complaint was filed -- one-and-a-half years after Hess repaid all of his loans -- Southeast was declared insolvent and the FDIC was appointed receiver. The FDIC substituted itself as defendant in this action and removed the case to the United States District Court for the Southern District of Florida. Southeast is under receivership, but is in the unusual circumstance of having a multimillion dollar surplus. All creditors with valid claims against the Southeast receivership are expected to regain their principal and may receive a portion of the interest.[4]

In September 1992, the FDIC moved to dismiss petitioners' action for failure to state a claim, arguing that the written loan agreement did not obligate Southeast either to conduct the audits or to notify Hess of any irregularities. The FDIC further argued that, to the extent petitioners were relying on oral promises or representations, their claims were barred under the federal common-law D'Oench doctrine, and a related statutory provision, 12 U.S.C. § 1823(e). Petitioners then requested leave to amend their complaint to make clear that they wished to assert tort as well as contract claims. On November 25, 1992, the district court granted the FDIC's

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[4] Trustee for Southeast Seeks to Distribute Bank Assets to Holders, Wall St. J., Apr. 4, 1994, at A5G.

motion to dismiss, agreeing that all claims based on any oral side agreement were unenforceable under both D'Oench and § 1823(e). The district court denied rehearing on May 10, 1993.

A three-judge panel of the Eleventh Circuit unanimously held that petitioners' tort claims fell within the "free standing tort" exception to D'Oench and therefore reversed the district court's judgment and remanded the case. No. 96-106 Pet. App. 56a-73a. The panel held that petitioners' claims "do not . . . implicate the records of regular banking transactions" and therefore are "protected from the bar of the D'Oench doctrine." Id. at 70a.

The Eleventh Circuit granted rehearing en banc, and affirmed the judgment of the district court. No. 96-106 Pet. App. 1a-55a. In doing so, the Eleventh Circuit expressly and squarely disagreed with the District of Columbia and Eighth Circuits on the viability of the federal common-law D'Oench doctrine, and set forth a novel and exceedingly narrow interpretation of this Court's decision in O'Melveny & Myers. The Eleventh Circuit specifically held that because Congress had not undertaken a "comprehensive examination" of the "the evolving common law D'Oench doctrine," which the Eleventh Circuit described as "vast," nothing in FIRREA or O'Melveny should be read to displace that doctrine, or to restrict its further evolution. No. 96-106 Pet. App. 24a, 25a (emphasis added). The Eleventh Circuit acknowledged: "We disagree with the analysis of the D.C. and Eighth Circuits and hold that the federal common law D'Oench has not been preempted by statute." No. 96-106 Pet. App. 14a; see also id. at 19a ("We disagree with Murphy's reliance on O'Melveny.").

In response to Hess's petition for certiorari, this Court vacated the en banc decision of the Eleventh Circuit and remanded the case for reconsideration in light of this Court's

intervening decision in Atherton v. FDIC, supra. See 117 S. Ct. at 760 (1997).

On remand, the court of appeals again ordered petitioners' claims dismissed on the basis of the D'Oench doctrine. The court still acknowledged that the circuits were hopelessly split on this issue. With respect to the effect of this Court's decisions in O'Melveny and Atherton, the court of appeals dismissed them as cases refusing to create new common law rules and instead found applicable this Court's decision in United States v. Texas, 507 U.S. 529 (1993), which requires Congress to act expressly to modify a specific federal common law rule. Thus, neither the codification of D'Oench in Section 1823(e) nor the enactment of FIRREA generally was sufficient to prevent the court of appeals from applying an "evolving" federal common law rule based on the principle of protecting the FDIC as the sole basis for dismissing petitioners' otherwise valid state law claims.[5]

STATUTORY BACKGROUND

The Court in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), fashioned a rule of federal common law barring state-law defenses against the FDIC that are based on secret agreements between a failed bank and its debtors. D'Oench

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[5] The court of appeals expressly rejected the FDIC's argument that FIRREA could not apply retroactively to displace the D'Oench doctrine, reasoning that the issue was irrelevant because FIRREA did not preempt D'Oench. App. 10a n.6. For the same reason, that court did not address petitioners' related argument that retroactivity is not the proper analysis when the issue is whether a statute has displaced the federal common law rule because federal courts must consider after-enacted statutes in deciding what, if any, role remains for federal common law. See, e.g., City of Milwaukee v. Illinois, 451 U.S. 304, 309-310, 312 n.5 (1981); Murphy v. FDIC, 61 F.3d34, 40 (D.C. Cir. 1995).

involved a securities dealer who sold bonds to a bank. The bond issuer subsequently defaulted. To help the bank conceal the past due bonds in its records, the dealer executed promissory notes in the amount of the bonds. In return, the bank secretly agreed not to call for payment on the notes. Nonetheless, the bank carried the notes on its books as assets. When the bank failed, the FDIC sued for payment of the notes, and the dealer asserted the defense of lack of consideration. D'Oench held that to allow the dealer to rely upon the secret agreement in defense of payment would run contrary to the policy of protecting the FDIC and its fund against misrepresentations regarding the bank's assets. Writing for the majority, Justice Douglas fashioned a new rule of federal common law estopping the maker of a secret agreement from relying on the agreement as a defense to collection of a bank asset by the FDIC whenever the maker has "lent himself to a scheme or arrangement whereby the [FDIC] was or was likely to be misled." Id. at 460.

The specific rule of federal law created in D'Oench was itself fashioned in a statutory vacuum, see id. at 459, but was enacted by Congress eight years later. Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, § 13(e), 64 Stat. 873, 889 (codified at 12 U.S.C. § 1823(e) (1952)). The codification was both narrower and more expansive than the D'Oench opinion. On the one hand, the statute was more expansive to the extent that it applied to certain agreements even if the borrower had not participated in a scheme in which the FDIC "was or was likely to be misled." Compare D'Oench, 315 U.S. at 460 with 12 U.S.C. § 1823(e). At the same time, the statute's scope was narrower than the broadest interpretation of D'Oench's dictum, although it was broad enough to cover D'Oench's specific holding. While D'Oench created a judicial rule of equitable estoppel, § 1823(e) barred defenses only when explicit requirements of the statute were

met. For example, the statute applied to an agreement that "diminish[es]" an FDIC asset; it did not bar all claims arising out of unwritten agreements. 12 U.S.C. § 1823(e).

For decades, the Court had no occasion to address the effect of § 1823(e) on the ability of the federal courts to expand federal common law to invalidate claims that were permitted by § 1823(e). In fact, the next occasion this Court had to discuss D'Oench was in Langley v. FDIC, 484 U.S. 86 (1987). In Langley, a borrower sought to avoid payment on a note by claiming the failed bank had procured the note by misrepresenting the value of the underlying property. This Court held that § 1823(e) applied and used D'Oench only to interpret § 1823(e). Thus, Langley did not explicitly decide the issue of whether the statute prevented the further "evolution" of a common-law D'Oench doctrine. However, the Court did refer to D'Oench as the leading case in the area "prior to enactment of § 1823(e)." 484 U.S. at 92 (emphasis added); see Murphy v. FDIC, 61 F.3d 34, 39 (D.C. Cir. 1995). Most important, Langley indicated that if an agreement is permitted by § 1823(e) it "prevails even if the FDIC did not know of it . . . . It would be rewriting the statute to hold otherwise." 484 U.S. at 95 (emphasis added). Shortly after Langley, the Court described borrower claims against a federal receiver based on a savings and loan's oral agreements and torts as governed by "state law." Coit Independence Joint Venture v. FSLIC, 489 U.S. 561, 577, 578, 585 (1989).

In 1989, § 1823(e) was modified with the enactment of FIRREA. FIRREA adopted several expansions to the provision enacted in 1950. For example, § 1823(e) was extended to protect the FDIC in its capacity as receiver of a failed bank, to the Resolution Trust Corporation (RTC) in either receiver or corporate capacity, and to bridge banks. Section 217(4) of FIRREA, Pub. L. No. 101-73, 103 Stat. 183, 256 (codified at

12 U.S.C. § 1823(e)) (FDIC as receiver); 12 U.S.C. § 1441a(b)(4)(A) (RTC); id. § 1821(n)(4)(I) (bridge banks). In addition, 12 U.S.C. § 1821(d)(9)(A) was added, and it provides that "any agreement which does not meet the requirements set forth in § 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC]." Id. § 1821(d)(9)(A) (emphasis added). FIRREA also added a gap-filling provision that requires the FDIC to "pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." Id. § 1821(d)(2)(H) (emphasis added).

This Court first considered the effect of FIRREA on the judicial creation of federal common law in O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994). At particular issue was the meaning and applicability of a FIRREA provision that states that the FDIC shall "by operation of law, succeed to . . . all rights, titles, powers, and privileges of the insured depository institution." 12 U.S.C. § 1821(d)(2)(A)(i). The defendant in O'Melveny maintained that, under this section, any defense available against a failed bank would likewise be good against the FDIC as receiver. 512 U.S. 86. The FDIC argued that the statute was nonexclusive and that federal common law was available to supplement the FDIC's rights. Id. This Court unanimously rejected the FDIC's argument and stated that it "would [not] adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." Id. at 85.

Most recently, the Court last Term in Atherton v. FDIC, 117 S. Ct. 666 (1997), again refused to apply a federal common law rule to govern bank directors' and officers' standard of care in tort actions brought against them after the bank was placed into receivership. The Court reaffirmed its general disapproval

of federal common law, particularly in areas where "Congress has enacted related legislation." Id. at 670. The Court found no federal interest that could justify adopting a rule that Congress itself had not enacted. Id. at 671-672.

REASONS FOR GRANTING THE PETITION

In this case, the Eleventh Circuit, sitting en banc, held that a "vast" and "evolving" common-law D'Oench doctrine continues to operate to this day, which provides extraordinary protections to the FDIC beyond those Congress has enacted. Thus, the court of appeals created rules under that "evolving" doctrine to bar petitioners' contract, fiduciary duty, and negligence claims. No. 96-106 Pet. App. 20a-28a., 53a. In so holding, the Eleventh Circuit expressly acknowledged that it was in direct conflict with decisions of the United States Courts of Appeals for the District of Columbia and Eighth Circuits. Id. at 14a (citing Murphy v. FDIC, 61 F.3d 34, 38 (D.C. Cir. (1995); DiVall Insured Income Fund Ltd. v. Boatmen's First Nat'l Bank, 69 F.3d 1398, 1402 (8th Cir. 1995)). The decision also conflicts with the subsequent holding of the Ninth Circuit in Ledo Financial Corp. v. Summers, 122 F.3d 825 (9th Cir. 1997).

Moreover, the Eleventh Circuit's decision to continue to create common-law rules to supplement, and thus alter, FIRREA is inconsistent with a controlling decision of this Court, O'Melveny & Myers v. FDIC, supra, as well as a long line of precedent on the severely limited role of federal common law, particularly when Congress has enacted related legislation. See, e.g., City of Milwaukee v. Illinois, 451 U.S. 304, 313-14 (1980). The court of appeals' reliance upon United States v. Texas, as trumping the holdings of O'Melveny and City of Milwaukee does nothing more than reinforce the need for this

Court to clarify the law in this area. For all of these reasons, the Court should grant this petition.

I. THE DECISION BELOW EXPRESSLY AND SQUARELY CONFLICTS WITH THE DECISIONS OF THE DISTRICT OF COLUMBIA AND THE EIGHTH AND NINTH CIRCUITS.

A. As the Eleventh Circuit acknowledged, its holding creates a conflict among the circuits on the question whether an evolving common-law D'Oench has been preempted by statute. App. 3a, No. 96-106 Pet. App. 14a. The court stated: "We disagree with the analysis of the D.C. and the Eighth Circuits and hold that the federal common law D'Oench doctrine has not been preempted by statute." Id. This circuit split is most clearly presented by a comparison between the Eleventh Circuit's decision and the D.C. Circuit's decision in Murphy v. FDIC, 61 F.3d 34 (D.C. Cir. 1995), which presented facts strikingly similar to the facts here.[6]

Murphy concerned an investor in a failed real estate venture. The investor sought damages from the FDIC on the theory that the now-insolvent lender on the project had assumed the legal duties of a partner and had caused the venture to fail. Id. at 35. The district court in Murphy granted summary judgment in favor of the FDIC on the ground that the plaintiff was unable to point to a written agreement supporting his theory of liability and so was barred from asserting his claims by D'Oench. Id. at 35-36. The plaintiff asserted on appeal, however, that 12 U.S.C. § 1823(e) could be used to bar claims only where the FDIC could demonstrate that its interest in a specific asset would be diminished if the plaintiff were

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[6] Indeed, the conflict is highlighted by the fact that Murphy, like Hess in this case, was suing FDIC as receiver for Southeast Bank.

successful. Id. at 37. The plaintiff also asserted that no federal common-law D'Oench rule could be used to bar his claims because federal common law had been displaced by FIRREA. Id. at 36.

The D.C. Circuit agreed with the investor on both counts, holding that (1) the asset "diminish[ment]" requirement of § 1823(e) was not met where the loan had been paid off prior to the bank entering receivership,[7] and (2) under O'Melveny, FIRREA displaced the federal common-law D'Oench doctrine as a separate bar to claims against the FDIC. Id. at 37-39. The Murphy court stated, "[I]n O'Melveny & Myers[,] the Supreme Court does not flatly state that D'Oench has been preempted by the FIRREA, but it does set forth some more general propositions that, we think, lead ineluctably to that conclusion." Id. at 38. The court also noted that the O'Melveny Court had been "specifically advised by both sides on brief and at oral argument that resolution of the issue before it could also affect the D'Oench doctrine." Id. at 39. Whereas the Eleventh Circuit held O'Melveny to be inapplicable, the D.C. Circuit interpreted O'Melveny to hold that FIRREA excludes "overlapping federal common law defenses not specifically mentioned in the statute -- of which the D'Oench doctrine is one." Id.

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[7] Numerous other appellate courts have concurred with the D.C. Circuit's interpretation of the specific asset requirement of § 1823(e). See Ledo Fin. Corp. v. Summers, 122 F.3d 825, 830 (9th Cir. 1997); Inn at Saratoga Assocs. v. FDIC, 60 F.3d 78, 82 (2d Cir. 1995); John v. RTC, 39 F.3d 773, 776-77 (7th Cir. 1994); Murphy v. FDIC, 38 F.3d 1490, 1500 (9th Cir. 1994) (en banc); Villafane-Neriz v. FDIC, 20 F.3d 35, 40, 41 (1st Cir. 1994); Thigpen v. Sparks, 983 F.2d 644, 648-49 (5th Cir. 1993); Commerce Fed. Sav. Bank v. FDIC, 872 F.2d 1240, 1246 (6th Cir. 1989). The Eleventh Circuit expressly declined to disagree. No. 96-106 Pet. App. 29a-30a ("In light of our holding that the federal common law D'Oench doctrine has not been preempted, we need not decide whether §§ 1821(d)(9)(A) or 1823(e)(1) are limited to claims that impair the FDIC's interest in a specific asset.").

Similarly, the Eleventh Circuit's holding expressly conflicts with the decision of the Eighth Circuit in DiVall Insured Income Fund Ltd. v. Boatmen's First Nat'l Bank, 69 F.3d 1398 (8th Cir. 1995). In DiVall, the district court granted summary judgment against the plaintiff based on the federal holder-in-due-course doctrine. Id. at 1400. The Eighth Circuit reversed, applying O'Melveny to hold that the extensive provisions of FIRREA preempted a federal common-law D'Oench rule. The court held:

> When Congress enacted the comprehensive regulatory framework of FIRREA, it preempted the federal common law rules that restricted the claims and defenses which parties could raise against the FDIC. Accordingly, we hold that O'Melveny removes the federal common law D'Oench, Duhme doctrine and the federal holder in due course doctrine.

Id. at 1402.

The split among the circuits, which existed when this case was last before the Court, is further exacerbated by the Ninth Circuit's most recent decision in Ledo Financial Corporation v. Summers, 122 F.3d 825 (9th Cir. 1997). In Ledo the plaintiff alleged that it was defrauded pursuant to an unwritten agreement by the failed thrift. The FDIC as receiver sought dismissal of the fraud claim under both D'Oench and § 1823(e). The Ninth Circuit concluded that in light of O'Melveny and Atherton there was no basis to apply a federal common law rule of decision to bar the plaintiffs' claim that, like the one here, is plainly valid as a matter of state law. 122 F.3d at 828-29. See FDIC v. O'Melveny v. Myers, 61 F.3d 17, 18-19 (9th Cir. 1995) (per curiam) (D'Oench and lower court cases expanding D'Oench "have now been overruled by the Supreme

Court").[8] Similarly, the court rejected § 1823(e) as a bar because there was no "asset" of the bank involved, which is necessary for that provision to apply.[9]

In addition to these square conflicts among the circuits, the Third Circuit has "note[d] that the D'Oench, Duhme doctrine may no longer be a separate bar to plaintiffs' claims." DiMuzio v. RTC, 68 F.3d 777, 780 n.2 (3d Cir. 1995) (citing O'Melveny and Murphy). The First Circuit similarly has observed that "[a] circuit split appears to have developed over the question of whether [§] 1823(e) has preempted D'Oench." Adams v. Zimmerman, 73 F.3d 1164, 1168-69 n.2 (1st Cir. 1996) (comparing Murphy, DiVall, and FDIC v. McClanahan, 795 F.2d 512, 514 n.1 (5th Cir. 1986)). Thus, there can be no doubt that the decision below conflicts with the decisions of other courts of appeals on the validity of D'Oench.

The question presented here is not whether the specific holding of D'Oench itself should be overruled because that holding is codified in 12 U.S.C. § 1823(e). Rather, the question is whether, for claims Congress elected not to bar by statute, federal courts can fashion "evolving" federal common-law defenses limiting the civil liability of the FDIC as successor to a failed bank. If this Court agrees with the Eighth, Ninth and D.C. Circuits that Congress displaced any evolving common-law doctrine, no part of any "evolving" D'Oench "doctrine" that

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[8] Dicta in another Ninth Circuit opinion also questions the viability of federal common-law D'Oench. See RTC v. Kennelly, 57 F.3d 819, 822 n.3 (9th Cir. 1995) ("There is serious doubt whether D'Oench, Duhme survives O'Melveny & Myers v. FDIC.") (citation omitted).

[9] The Eleventh Circuit's decision has been followed in the Fourth Circuit, Young v. FDIC, 103 F.3d 1180 (4th Cir.), cert. denied, 118 S. Ct.329 (1997). See note 11, infra.

was not codified could serve as an independent bar to state-law claims that are permitted by the statute.

The question of the viability of federal common-law D'Oench is implicated in federal court cases several times each month. In the years since this Court decided O'Melveny, federal successors have relied on D'Oench, at least in part, in more than 100 reported cases.[10] Given the continuing reliance of federal successors, including the FDIC, on an evolving common-law D'Oench doctrine, this case presents an important and recurring issue that warrants review by this Court.

B. Because the FDIC is unwilling to defend in this Court the position it has taken in the courts of appeals that has generated the hopeless conflict among the circuits, it likely will oppose certiorari, notwithstanding the crying need to have this conflict resolved and notwithstanding the shameful spectacle of private litigants, whose situations are identical, being treated in diametrically opposite ways based solely on the happenstance of geography. The notion that a plaintiff prevails if he has the good fortune to sue a bank operating in the District of Columbia, but loses if he crosses the Potomac River and banks in Alexandria should be intolerable.

If this Court grants the petition and ultimately reverses the judgment below, petitioners' claims under Florida law can be properly considered on remand. The Florida state court judge, prior to the FDIC's entrance and removal to federal court,

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[10] Of the cases in Westlaw's database that cited "D'Oench" since June 14, 1994, well over 100 both involve a federal successor and discuss D'Oench as a bar to the plaintiff's claims. See also Capizzi v. FDIC, 937 F.2d 8, 11 (1st Cir. 1991) (Breyer, C.J.) ("anywhere from nearly 10 percent to about 20 percent of cases over the last five years in which the FDIC has been a party has involved the D'Oench defense in some manner").

denied the bank's motion to dismiss petitioners' state-law claims. No. 96-106 Pet. App. 84a. The Eleventh Circuit's lengthy discussion of the viability of petitioners' claims similarly indicates that, absent its interpretation of D'Oench, petitioners have stated viable claims under state law. No. 96-106 Pet. App. 39a, 41a, 42a n.22, 44a, 50a n.27, 51a, 53a.

Nevertheless, both in response to Hess's previous petition and in response to a prior petition from a Fourth Circuit case the FDIC conceded, as it must, that there is a conflict in the circuits, but still opposed certiorari.[11] Neither of the FDIC's primary arguments withstands scrutiny or justifies denying the petition in this case. Indeed, the Court's decision to grant Hess's previous petition in the face of these arguments itself suggests that they plainly do not warrant denying the petition.

First, the FDIC has asserted that FIRREA should not be applied retroactively and therefore the question of whether FIRREA "preempts" the evolving D'Oench doctrine that survives in the Eleventh Circuit is not squarely posed by this case, which arguably arises pre-FIRREA. The flaw in this

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[11] Although the opposition in Young made a couple of arguments that are unavailing (see p. 21, infra), it is at least understandable why the FDIC opposed certiorari in Young. There the facts underlying the plaintiffs' claims were exceedingly complicated; there was a serious question as to whether the complaint stated a claim for relief under state law; and the petitioners in Young never even asserted that they could avoid Section 1823. See Brief In Opp. of FDIC at 8 n.4, 13 n.8, Young v. FDIC, 103 F.3d 1180 (4th Cir. 1997) (No. 97-65). These are certainly legitimate grounds for urging the Court to postpone deciding the D'Oench issue, and no doubt explain why the Court denied certiorari in Young. Young v. FDIC, 118 S. Ct. 329 (1997). Here, by contrast, the claim is simple; the state court already has upheld Hess's claims against a motion to dismiss; and there is no question that Section 1823(e) and its companion Section 1821(d)(9)(A) are no obstacle to Hess's claims because there is no asset of the institution involved, as "required" by those provisions. See Langley, 484 U.S. at 95. See p. 26, infra.

argument is that the issue of what federal common law rule applies to a particular situation is not governed by the traditional retroactivity principles embodied in cases like Landgraff v. USI Film Products, 511 U.S. 244 (1994). Instead, in deciding whether to fashion a common law rule, the Court considers the state of the law at the time it decides what rule to apply because that approach is mandated by respect for Congress's authority. Murphy, 61 F.3d at 40; City of Milwaukee, 451 U.S. 304, 309-310 (1980). To ignore what Congress has said in response to a problem and adopt a contrary rule as a matter of federal common law is simply inconsistent with the Court's "commitment to the separation of powers . . . ." Murphy, 61 F.3d at 40, quoting City of Milwaukee, 451 U.S. at 314-315. Accordingly, retroactivity is a red herring. The issue posed is whether a federal court today is permitted to continue to tap into a "vast" and "evolving" federal common law in light of Congress's actions in FIRREA. That question is squarely posed in this case.[12]

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[12] The retroactivity argument has additional flaws that make plain the makeweight nature of this contention to avoid certiorari. First, Section 1821(d)(2)(H) states that all post-FIRREA receivers "shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." (Emphasis added). This is as express a command as Congress is capable of issuing that the FDIC is limited to statutory defenses. Incredibly, the Eleventh Circuit concluded that the provision did not apply because the term "valid obligation" incorporated the limitations of D'Oench. App. 9a. Of course, if new common law defenses are incorporated, then the statutory "prescriptions and limitations" that are supposed to apply become meaningless.

In addition, the FDIC adopts the transaction date as the relevant date for retroactivity purposes. O'Melveny indicates that the date of receivership is the critical date. 512 U.S. at 85. Because retroactivity remains irrelevant, however, the question of which event triggers a retroactivity inquiry is plainly beside the point.

The FDIC's alternative, but related argument is that the passage of FIRREA makes resolution of the D'Oench issue of only limited prospective significance. This is based on the FDIC's argument that Section 1821(d)(9)(A), contrary not only to its plain language, but also to this Court's discussion of the statute in Langley and the holdings of every court of appeals on the issue, does not incorporate the requirement of Section 1823(e), that an asset of the institution must be involved.[13] The problem with this argument is that in the Eleventh Circuit the law will always remain the same because the narrow interpretation of Section 1821(d)(9)(A) is no obstacle to the application of the broader interpretation of D'Oench that survives in that circuit en banc. Thus, panels in future cases, as in this case, will decline to consider the effect of FIRREA because that court now has concluded that FIRREA is utterly beside the point. Thus, the opinion on remand makes plain that the statute in no way undermines the compelling need to have the Eleventh Circuit's conclusions concerning the robust state of D'Oench's health reviewed, and this case presents the perfect vehicle for that plenary consideration.

II. THE COURT SHOULD GRANT THE PETITION TO DECIDE THE PROPER RELATIONSHIP BETWEEN UNITED STATES V. TEXAS, AND O'MELVENY AND CITY OF MILWAUKEE.

In addition to the clear need for a decision on D'Oench

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[13] See, e.g., Murphy, 61 F.3d at 38; John v. RTC, 39 F.3d 773, 776 (7th Cir. 1994) (describing the reading of section 1821(d)(9)(A) as limited in scope to transactions covered by section 1823(e) as "the only sensible reading"); Murphy v. FDIC, 38 F.3d 1490, 1500-1501 (9th Cir. 1994) (en banc); Thigpen v. Sparks, 983 F.2d 644, 649 (5th Cir. 1993) (describing the government's proposed interpretation as transforming the statute into a "meat-axe"). See also Ledo Fin. Corp., 122 F.3d at 828-30.

evidenced by the extraordinary conflict among the circuits, the court of appeals' holding in this case warrants review because it suggests that there is a lack of clarity in this Court's decisions concerning the basic relationship between actions by Congress and federal common law principles. In particular, the question of the relationship between United States v. Texas and the Court's decisions in O'Melveny and the line of cases including City of Milwaukee has at least confused the Eleventh Circuit. Thus, the need to clarify the law governing the general relationship between federal statutes and federal common law provides an independent rationale for granting review in this case.

A. The "Speak Directly" Test Does Not Apply Here.

In Texas, this Court held a pre-existing, on-point federal common-law rule of the Supreme Court is only preempted by a statute when Congress "speak[s] directly" to that issue. Id. at 534. The Eleventh Circuit wrongly concluded that this rule applies here. The "speak directly" test, however, applies only when there is an existing, directly-on-point common-law rule set forth by this Court prior to the statute.

In contrast, in this case, there was no established rule set forth by this Court barring claims like that of Hess when Congress first enacted 12 U.S.C. § 1823(e) or when Congress enacted FIRREA. Hess's claims are very different from those in D'Oench. This Court has emphasized in D'Oench itself, see 315 U.S. at 458-61, and in later decisions that D'Oench involved a borrower's attempt to use as a defense to liability its own knowing participation in a "secret agreement" that would likely deceive the FDIC as to a specific bank asset. Langley v. FDIC, 484 U.S. 86, 92 (1987); United States v. Yazell, 382 U.S. 341, 354 (1966). D'Oench specifically stated that the

question it addressed was whether "the liability of [the borrower] on the note involves decision of a federal, not a state, question." 315 U.S. at 456. D'Oench repeatedly emphasized that it was creating federal common law to address the use of a secret agreement "as a defense" to liability on a note that appeared in the bank's records as a noncontingent asset. Id. at 458-61.

Unlike the situation in D'Oench, here the FDIC was not and could not have been deceived about an asset of Southeast that involved Hess or Motorcity. Prior to the receivership, Hess had long since paid in full all of Motorcity's obligations to Southeast, and Hess's claim did not affect the amount he had previously owed the bank. Not only was no asset affected, there was also no secret. Hess filed his first complaint prior to Southeast's default and almost a full year before the FDIC's receivership. The only possible information about Hess or Motorcity that could have been useful to the FDIC was that he had filed suit against the bank. Hess had filed and served his complaint -- there was no secret.

Moreover, when Congress enacted FIRREA in 1989, the most recent indications from this Court -- Langley and Coit -- were that state law governed if a borrower's claims were not barred by federal statute. See supra, at 10-11. Langley and Coit demolish any notion that existing federal common law controlled such borrower claims prior to FIRREA.

By barring petitioners' claims, the Eleventh Circuit extended what it called the evolving" D'Oench doctrine, No. 96-106 Pet. App. 24a, and created a new rule of federal common law. Accordingly, the Eleventh Circuit's application of Texas is misplaced because this Court has held that it is "difficult to argue," to say the least that the "speak directly" test applies to

"a federal common-law remedy not yet recognized by this Court." City of Milwaukee v. Illinois, 451 U.S. 304, 327 n.19 (1980) (emphasis added).

B. FIRREA Satisfies Any "Speak Directly" Test.

In all events, FIRREA more than satisfies the "speak directly" test. First, as this Court's decision in Langley makes plain, D'Oench and § 1823(e) speak to the same subject. See Langley, 484 U.S. at 92-93. That subject is: When are agreements that are enforceable against the bank not enforceable against the FDIC as successor? Indeed, in its brief in O'Melveny to this Court, the FDIC stated that "both Section 1823(e) and D'Oench, Duhme address the question of whether a secret side agreement may constitute a defense to an action on a note by FDIC as receiver for an insured financial institution." Brief for the FDIC, at 38 (No. 93-489); see also id. at 43 (§ 1823(e) "does overlap the D'Oench Duhme doctrine substantially"). This Court has held that far less of an exact congruence satisfies the "speak directly" test. See, e.g., Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 620, 622 (1978) (holding that a provision in a noncomprehensive statute that "'recovery . . . shall be a fair and just compensation for the pecuniary loss'" precludes a common law rule that allowed awards for "loss of society") (quoting 46 U.S.C. § 762).[14]

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[14] The "speak directly" test does not require that the later statute have "affirmatively proscribed the use of federal common law." City of Milwaukee, 451 U.S. at 315; accord Texas, 507 U.S. at 534. See also Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108-09 (1991) (there is no requirement of a "clear statement" or "strict construction"). Rather, the "speak directly" test is satisfied by a statute's "natural meaning," Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952), or by an "implication" arising from the traditional tools of statutory interpretation, Astoria, 501 U.S. at 110. Here, § (continued...)

Second, if there was any basis for doubting that § 1823(e) speaks directly and precludes courts from supplementing or altering it with federal common law, that doubt was removed by Congress in 1989 when it enacted FIRREA. In particular, 12 U.S.C. § 1821(d)(2)(H) specifically commands that "[t]he Corporation . . . shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." (Emphasis added.) It is difficult to imagine a plainer statutory instruction against further judicial "evolution" of federal common-law D'Oench defenses -- a judge-made defense is not a "limitation[] of this chapter." Id. See note, supra.

O'Melveny addressed an analogous provision of FIRREA, 12 U.S.C. § 1821(d)(2)(A)(i). Section 1821(d)(2)(A)(i) provides that the FDIC as receiver "shall . . . succeed to . . . all rights, titles, powers, and privileges of the insured depository institution." (Emphasis added.) O'Melveny held that this provision means that the FDIC succeeds to the bank's "claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." 512 U.S. at 87 (emphasis added). O'Melveny's reasoning also applies to § 1821(d)(2)(H), which ties the FDIC's obligations and defenses to those of the bank at least as clearly as § 1821(d)(2)(A)(i) does for the FDIC's rights and claims. Therefore, the reasoning in O'Melveny leads to "the conclusion that [§ 1821(d)(2)(H)] places the FDIC in the shoes of the insolvent [bank], to [pay its valid obligations] under state law, except where some provision in the extensive framework of FIRREA provides otherwise." 512 U.S. at 87.

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[14] (...continued)
1823(e) satisfies the "speak directly" test because, among other things, § 1823(e) would be "superfluous" if evolving common law D'Oench continued to apply. Id. at 112.

A court that desires to create extra defenses for the FDIC outside of those in the statute does so out of whole cloth and in violation of the explicit provisions of § 1821(d)(2)(H). The decision below does great damage to both separation of powers and federalism by effectively writing its own statute that limits the FDIC's obligations as successor "in accordance with the prescriptions and limitations of this chapter or federal common law." 12 U.S.C. § 1821(d)(2)(H) (emphasized material added). Congress certainly knows how expressly to recognize supplementary federal common law when it so desires.[15] It chose not to do so here, and the federal courts have no license to disregard Congress's policy determination.

Third, O'Melveny holds that FIRREA is "comprehensive legislation." 512 U.S. at 85; see also United States v. Winstar Corp., 116 S. Ct. 2432, 2446 (1996) (plurality opinion) ("FIRREA made enormous changes in the structure of federal thrift regulation"); H.R. Rep. No. 101-54(I), at 415 (1989), reprinted in 1989 U.S.C.C.A.N. 86, 211 (12 U.S.C. § 1821(d), as amended by FIRREA, is "comprehensive"); S. Rep. No. 101-19, at 313 (1989) (12 U.S.C. § 1821(d) is a "common code" of the FDIC's rights as receiver). By definition, "comprehensive" legislation covers a field such that it is the exclusive voice of federal law that speaks to all issues within that field. See City of Milwaukee, 451 U.S. at 319 ("comprehensive program" of statutory provisions "strongly suggests that there is no room for courts to attempt to improve

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[15] See, e.g. 42 U.S.C. § 6991b(d)(3) ("Nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual, or common law liability of a guarantor to its owner or operator . . ."); id. § 9608(d)(2) ("Nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual, or common law liability of a guarantor . . "); id. § 11046(g) ("Nothing in this section shall restrict or expand any right which any person (or class of persons) may have under any Federal or State statute or common law . . .").

on that program with federal common law"); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 788-89 (1952) (statute displaces prior federal common law when statute lists powers and omits power claimed under prior federal common law). Thus, the very comprehensiveness of FIRREA, particularly on the issues of a receiver's rights and obligations, speaks directly to -- and thus displaces -- any previously existing federal common law.

C. The Eleventh Circuit's "Speak Directly" Argument Was Rejected in O'Melveny.

In the end, the decision below accepts the exact FDIC argument that this Court rejected in O'Melveny. In O'Melveny, the FDIC conceded that the specific holding of D'Oench was limited to "a defense to an action on a note by FDIC as receiver," Brief for the FDIC at 38, O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) (No. 93-489), but argued that D'Oench stood for a broader "doctrine" and "principle" of federal common law. Id. at 41. The FDIC further argued that this broader doctrine was not displaced by FIRREA, id., because "'[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law.'" id. at 36 (emphasis added) (quoting United States v. Texas, 507 U.S. 529, 534 (1993)). O'Melveny rejected the FDIC's argument that D'Oench created a "principle" far broader than its holding and that this evolving principle was not displaced by FIRREA. Having failed to persuade this Court in O'Melveny, the FDIC rehashed the same argument twice to the Eleventh Circuit, and the Eleventh Circuit incorrectly adopted it twice. This Court set the decision aside once. The court of appeals' decision to revive the conflict with O'Melveny, coupled with the conflict among the courts of appeals on the issue presented in this petition, warrants certiorari.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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December 18, 1997

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APPENDIX

APPENDIX A

[Filed Aug. 20, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4634

D. C. Docket No. 91-2305-CIV-HIGHSMITH

MOTORCITY OF JACKSONVILLE, LTD., a limited partnership, by and through its general partner Motorcity of Jacksonville, Inc., a Florida corporation, DAVID S. HESS,

Plaintiffs-Appellants,

versus

SOUTHEAST BANK N.A., DAVID FEIGENBAUM,
Defendants,

FEDERAL DEPOSIT INSURANCE CORPORATION,
as receiver for Southeast Bank, N.A.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(August 20, 1997)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before HATCHETT, Chief Judge, TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, and BARKETT, Circuit Judges, and KRAVITCH*, Senior Circuit Judge.

ANDERSON, Circuit Judge:

I. INTRODUCTION

In this case, appellants Motorcity of Jacksonville, Ltd. and David S. Hess (collectively "Motorcity") contend that the district court erroneously granted a motion to dismiss in favor of appellee Federal Deposit Insurance Corporation ("FDIC") based on the *D'Oench* doctrine.[1] *See D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676 (1942). A panel of this court vacated the district court's dismissal. *See Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 39 F.3d 292 (11th Cir. 1994).[2] On rehearing en banc, this court affirmed the district court's dismissal, holding that neither the Federal Deposit Insurance Act of 1950, Pub. L. No. 797, 64 Stat. 873,

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* Senior U.S. Circuit Judge Phyllis A. Kravitch participated in both the initial panel decision and the prior en banc decision in this case while she was in regular active service. She took senior status effective January 1, 1997, and has elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

[1] For a recitation of the facts underlying this case, see *Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A.*, 83 F.3d 1317, 1321-22 (11th Cir. 1996) (en banc).

[2] The panel decision was based on the free standing tort exception to the *D'Oench* doctrine and did not address the preemption issue discussed in our en banc decision.

nor the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, displaced the federal common law *D'Oench* doctrine. *See Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A.*, 83 F.3d 1317, 1327-34 (11th Cir. 1996) (en banc).[3] At the time of our en banc decision, the D.C. Circuit and the Eighth Circuit had held that FIRREA displaced the *D'Oench* doctrine. *See Murphy v. FDIC*, 61 F.3d 34, 40 (D.C. Cir. 1995) (holding that FIRREA supplanted the *D'Oench* doctrine); *DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank*, 69 F.3d 1398, 1402 (8th Cir. 1995) (following the D.C. Circuit's holding in *Murphy* that FIRREA supplanted the *D'Oench* doctrine. Since the time of our decision, the Fourth Circuit has held that FIRREA does not displace the D'Oench doctrine. *See Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir. 1997) (following the holding in our en banc *Motorcity* decision that FIRREA does not abrogate the *D'Oench* doctrine). There is thus a split in the circuits on this issue. *See FDIC v. Houde*, 90 F.3d 600, 605 n.5 (1st Cir. 1996) (noting the split in the circuits).

The Supreme Court granted certiorari in this case, vacated our judgment, and remanded this case for further consideration in light of *Atherton v. FDIC*, _____ U.S. _____, 117 S. Ct. 666 (1997). *Hess v. FDIC*, _____ U.S. _____, 117 S. Ct. 760 (1997).

II. DISCUSSION

In *Atherton*, the Resolution Trust Corporation ("RTC") sued officers and directors of a federal savings association

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[3] We also reaffirmed that the *D'Oench* doctrine is not limited by a specific asset requirement, held that the free standing tort exception to the *D'Oench* doctrine does not apply to this case, and held that Motorcity does not have a viable state law claim. *Id.* at 1336, 1338, 1345.

("bank"), which had gone into receivership with the RTC as receiver. *Atherton*, 117 S. Ct. at 669. The RTC claimed that the bank's officers and directors had violated the legal standard of care which they owed to the bank. *Id.* The issue in *Atherton* was whether courts should look to state law, to federal common law, or to 12 U.S.C. § 1821(k), a provision of FIRREA, to determine what the standard of care is for federal bank officers and directors. *Id.* The Court held that state law determines the standard of care so long as the state standard is stricter than the gross negligence standard set forth in § 1821(k). *Id.* at 674. The Court explained that § 1821(k) sets a gross negligence floor which applies if the state standard of care is less strict. *Id.*

In reaching this conclusion, the Court first set § 1821(k) "to the side" and asked "whether, were there no such statute, federal common law would provide the applicable legal standard." *Id.* at 669-70. The Court recognized that it had articulated in *Briggs v. Spaulding*, 141 U.S. 132, 11 S. Ct. 924 (1891), a federal common law corporate governance standard. *Atherton*, 117 S. Ct. at 670. However, the Court noted that *Briggs* was decided long before *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), held that there is no federal general common law. *Atherton*, 117 S. Ct. at 670. The Court then addressed the issue of whether *Briggs* survived *Erie*, and held that it did not. *Id.* After so holding, the Court examined whether the matter of corporate governance standards for federally chartered banks was one of the few and restricted areas in which judicial creation of federal common law was justified. *Id.* Applying post-*Erie* jurisprudence, the Court characterized the issue as being whether the use of state law would constitute a significant conflict with some federal policy or interest such that the creation of a federal common law rule would be appropriate. *Id.* The Court examined several asserted federal interests and concluded that the use of state law would not significantly conflict with or pose a threat to any of these interests. *Id.* at 673. The Court explained that "[t]he federal

need [in this case] is far weaker than was present in what the Court has called the 'few and restricted instances' . . . in which this Court has created a federal common law." *Id.* (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 313, 101 S. Ct. 1784, 1790 (1981)).

The Court thus overruled *Briggs*, declined to create a new federal common law rule, and concluded that "[t]here is no federal common law that would create a general standard of care applicable to this case." *Id.* at 674. Having concluded that there was no applicable federal common law, the Court then embarked on its only preemption analysis. The Court analyzed whether § 1821(k) set the sole standard of care for federal bank officers and directors, thus preempting state law, or whether it merely set a floor guaranteeing at least a gross negligence standard. Relying on the statute's purpose and legislative history and on the savings clause of § 1821(k), which states that "[n]othing in this paragraph shall impair or affect any right of the Corporation under other applicable law," the Court held that the statute merely sets a gross negligence floor and that stricter state standards are not preempted. *Id.* at 674-76.

As the above discussion indicates, *Atherton* does not address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine. It is true that the *Atherton* facts implicated the preexisting federal common law rule announced in *Briggs*. However, rather than addressing whether § 1821(k) displaced the *Briggs* rule, the Court explicitly set § 1821(k) to the side and addressed the different issue of whether *Briggs* survived *Erie*. After concluding that *Briggs* did not survive, thus leaving no federal common law regarding the standard of care, the Court obviously never reached or addressed any issue of

statutory abrogation of federal common law.[4] Thus, in *Atherton*, as in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S. Ct. 2048 (1994), the Court's analysis focused on determining whether the *create* federal common law.

By contrast, the federal common law rule at issue in this case, the *D'Oench* doctrine, was first articulated by the Supreme Court in 1942, after *Erie*. The issue in this case therefore is not whether the *D'Oench* doctrine survived *Erie*, but rather whether Congress intended FIRREA to supplant the previously established and long-standing federal common law *D'Oench* doctrine. As explained in our previous en banc opinion, *United States v. Texas*, 507 U.S. 529, 113 S. Ct. 1631 (1993), applies in this context and provides a presumption in favor of retaining existing federal common law unless a statutory purpose to the contrary is evident. *See id.* at 534, 113 S. Ct. at 1634; *Motorcity*, 83 F.3d at 1330-34.

In order to transform this case into one for which the analysis of *Atherton* and *O'Melveny* is appropriate, this court would be required to overrule the Supreme Court's decision in *D'Oench*, which we cannot do. "Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court." Jaffree v. Wallace, 705 F.2d 1526, 1532 (11th Cir. 1983), *aff'd*, 472 U.S. 38, 105 S. Ct. 2479 (1985). The courts of appeals must follow Supreme Court precedent that has "direct application" in a case, even if it appears that the reasoning of the Supreme Court precedent has been rejected in other cases. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921 (1989). *See also Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir.), *cert.*

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[4] Consistent with this approach, *Atherton* does not even cite *United States v. Texas*, 507 U.S. 529, 113 S. Ct. 1631 (1993), the most recent Supreme Court decision addressing whether Congress intended to abrogate a preexisting and long-standing federal common law doctrine.

denied, 117 S. Ct. 516 (1996). Only the Supreme Court has "the prerogative of overruling its own decisions." *Rodriguez De Quijas*, 490 U.S. at 484, 109 S. Ct. at 1922.

Moreover, we detect no indications that *D'Oench* is ripe for overruling. It is true that in its post-*Erie* jurisprudence, the Supreme Court has explained that the creation of federal common law is appropriate only in the "'few and restricted'" instances where the use of state law would pose a significant threat to or conflict with a federal policy or interest. *O'Melveny*, 114 S. Ct. at 2055 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S. Ct. 1441, 1445 (1963)). However, in *D'Oench*, the Court examined the Federal Reserve Act and identified a significant federal interest and policy which warranted the creation of a federal common law rule:

> Public policy requires that a person who, for the accommodation of the bank, executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced . . . . Those principles are applicable here because of the federal policy evidenced in this Act to protect [the FDIC] . . . from misrepresentations made to induce or influence the action of [the FDIC], including misstatements as to the genuineness or integrity of securities in the portfolios of banks which it insures. . . . It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority . . . was or was likely to be misled.

D'Oench, 315 U.S. at 459-60, 62 S. Ct. at 680-81 (citations and internal quotations omitted).[5]

For the foregoing reasons, we decline to accept Motorcity's invitation to overrule *D'Oench*. With the *D'Oench* doctrine safely in place as a long-standing federal common law rule, we conclude that the appropriate analysis for the statutory abrogation issue presented in this case is that articulated in *United States v. Texas*, and not that articulated in *Atherton* and *O'Melveny*. We continue to believe that the analysis set forth in our prior en banc opinion reflects the most reasonable reading of Congress's intent -- i.e., that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine.[6]

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[5] We reject Motorcity's attempt to limit *D'Oench* to its narrow facts -- i.e., to cases involving a secret agreement related to a specific asset. Rather, we think it is clear from the *D'Oench* opinion that the Court applied a broader principle of law to the specific facts of that case. This reading is confirmed by the long-standing and well-established decisions of the several courts of appeals. Similarly, Motorcity's emphasis on the fact that it had paid off its loan before the FDIC took over Southeast Bank misconceives the federal policy of protecting the FDIC from misrepresentations. The bank examiners and the FDIC were misled from the moment Motorcity's written floor plan financing agreement appeared in the bank's records without the secret side agreement on which Motorcity seeks to rely.

[6] Having resolved the issue for which this case was remanded by the Supreme Court, we address in this footnote the several other arguments asserted by the parties on remand. We reject Motorcity's argument that Congress intended the Federal Deposit Insurance Act of 1950 to abrogate the *D'Oench* doctrine. Motorcity points to no indication, and our review has disclosed no indication, in the 1950 Act or its legislative history that Congress intended the 1950 Act to displace the *D'Oench* doctrine. *See Motorcity*, 83 F.3d at 1332. *See also FDIC v. McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986) ("The discussion of [§ 1823(e)] in the [1950 Act's] legislative history does not mention *D'Oench, Duhme*.")

(continued...)

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[6] (...continued)

Motorcity also contends that § 1821(d)(2)(H) indicates that Congress intended for FIRREA to displace the *D'Oench* doctrine. Section 1821(d)(2)(H) provides that "[t]he Corporation, as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." 12 U.S.C. § 1821(d)(2)(H). Motorcity contends that this provision supplants the *D'Oench* doctrine because the *D'Oench* doctrine is not a "limitation[ ] of this chapter." We agree with the FDIC, however, that § 1821(d)(2)(H) does not indicate a congressional intent to displace the *D'Oench* doctrine. Instead, § 1821(d)(2)(H) assumes that the claims in question are valid and addresses only the manner in which valid claims are to be paid. We think it is clear that the *United States v. Texas* test for statutory abrogation of federal common law has not been met. We are satisfied that it cannot be said that there is an "evident" statutory purposes to overcome the "'presumption favoring the retention of long-established and familiar principles.'" *United States v. Texas*, 315 U.S. at 534, 113 S. Ct. at 1634 (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S. Ct. 1011, 1014 (1952)).

Although not argued in its letter brief on remand, the FDIC has recently issued a Statement of Policy stating that 12 U.S.C. §§ 1821(d)(9)(A) and 1823(e)

> should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, . . . these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine.

Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, 62 FEd. Reg. 5984, 5984 (1997). *But see Murphy v. FDIC*, 61 F.3d 34, 38 (D.C. Cir. 1995); *Thigpen v. Sparks*, 983 F.2d 644, 649 (5th Cir. 1993); *In re NBW Commercial Paper Litigation*, 826 F. Supp. 1448, 1464-65 (D.D.C. 1992). Of course, if the FDIC's position is correct, and if § 1821(d)(9)(A) applies to this case, then the FDIC would prevail without our needing to reach the preemption issue.

(continued...)

III. CONCLUSION

Having carefully reconsidered our decision in light of *Atherton*, we REINSTATE our prior en banc opinion published at 83 F.3d 1317, and we REINSTATE our judgment AFFIRMING the district court's judgment granting the FDIC's motion to dismiss.

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[6] (...continued)

Finally, the FDIC has argued for the first time on remand that FIRREA cannot apply to this case because the alleged arrangement at issue occurred prior to FIRREA's enactment. Motorcity argues that FIRREA can apply to this case because the FDIC became the receiver for Southeast Bank after FIRREA's enactment. Because we conclude that FIRREA did not displace the *D'Oench* doctrine, and because we conclude that Motorcity's claims are *D'Oench*-barred, we need not delve into an analysis of whether FIRREA's application to this case would pose a retroactivity problem. *Cf. O'Melveny*, 114 S. Ct. at 2054-55 (declining to resolve the retroactivity question).

(2)

MAR 23 1998

CLERK

No. 97-1025

In the Supreme Court of the United States

OCTOBER TERM, 1997

DAVID S. HESS, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SOUTHEAST BANK, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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23 pp

QUESTION PRESENTED

Whether the common law doctrine first enunciated in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), has been statutorily supplanted with respect to claims based on transactions that occurred before the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

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BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The most recent opinion of the court of appeals (Pet. App. 1a-10a), sitting en banc, is reported at 120 F.3d 1140. The court's previous en banc opinion (96-106 Pet. App. 1a-55a) is reported at 83 F.3d 1317, and its initial panel opinion (96-106 Pet. App. 56a-73a) is reported at 39 F.3d 292.[1] The orders of the district court dismissing petitioners' complaint (96-106 Pet.

[1] Like petitioners, we refer to those opinions as they were reprinted in the appendix to the petition from the court of appeals' first en banc opinion, copies of which petitioners have lodged with the Court in connection with the present petition. See Pet. 2 n.1.

App. 76a-83a) and denying petitioners' motions for rehearing and for leave to amend their complaint (96-106 Pet. App. 74a-75a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1997. On November 5, 1997, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including December 18, 1997, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Our brief on behalf of the Federal Deposit Insurance Corporation (FDIC) in opposition to the first petition in this case, *Hess* v. *FDIC*, No. 96-106, set out (at 2-7) the history of the common-law doctrine first articulated by this Court more than 50 years ago in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). It explained (at 3-6) related statutory developments through the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, and described (at 6-7) this Court's decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994). That brief also discussed in some detail (at 7-14) the facts and procedural history of this case, including the court of appeals' first en banc opinion. We have lodged ten copies of our brief in No. 96-106 with the Clerk, compare Pet. 2 n.1, and we have reprinted, as an appendix to this brief, a February 1997 FDIC policy statement that also includes a brief review of the history of *D'Oench* and its statutory analogues. App., *infra*, 2a-4a.

2. In January 1997, this Court granted the petition in No. 96-106, vacated the court of appeals' judgment, and remanded the case to that court for reconsideration in light of the Court's decision the previous week in *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997). *Hess* v. *FDIC*, 117 S. Ct. 760 (1997). After entertaining new briefing concerning the effect of the decision in *Atherton*, the en banc court of appeals reinstated its prior opinion and its judgment affirming the district court's dismissal of petitioners' complaint. Pet. App. 1a-10a.

The court of appeals observed (Pet. App. 4a) that "[t]he issue in *Atherton* was whether courts should look to state law, to federal common law, or to 12 U.S.C. § 1821(k), a provision of FIRREA, to determine what the standard of care [was] for federal bank officers and directors" who were sued by a federal receiver after their institution failed. The court explained *Atherton*'s conclusion that the federal common-law standard of care articulated in *Briggs* v. *Spaulding*, 141 U.S. 132 (1891), had not survived the later decision in *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), and its determination that no federal interest justified the creation of a new federal common-law rule. Pet. App. 4a-5a. The court pointed out that *Atherton*'s "only preemption analysis" concerned "whether § 1821(k) set the sole standard of care for federal bank officers and directors, thus preempting state law," in the absence of any applicable federal common-law rule. *Id.* at 5a.

From its review of this Court's decision, the court of appeals concluded that "*Atherton* does not address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine." Pet. App. 5a. The court noted

that the facts in *Atherton* "implicated the preexisting federal common law rule announced in *Briggs*." *Ibid.* It explained, however, that

> rather than addressing whether § 1821(k) displaced the *Briggs* rule, the [opinion in *Atherton*] explicitly set § 1821(k) to the side and addressed the different issue of whether *Briggs* survived *Erie*. After concluding that *Briggs* did not survive, thus leaving no federal common law regarding the standard of care, the Court obviously never reached or addressed any issue of statutory abrogation of federal common law. Thus, in *Atherton*, as in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S. Ct. 2048 (1994), the Court's analysis focused on determining whether to *create* federal common law.

Id. at 5a-6a (footnote omitted). The court observed that the *D'Oench* doctrine, unlike the *Briggs* rule, "was first articulated by the Supreme Court in 1942, after *Erie*," in a decision that "examined the Federal Reserve Act and identified a significant federal interest and policy which warranted the creation of a federal common law rule." *Id.* at 6a-7a, citing *D'Oench*, 315 U.S. at 459-460. In the court of appeals' view, therefore, the issue in this case was "not whether the *D'Oench* doctrine survived *Erie*, but rather whether Congress intended FIRREA to supplant" that doctrine. Pet. App. 6a. On that issue, the court "continue[d] to believe that the analysis set forth in [its] prior en banc opinion reflects the most reasonable reading of Congress's intent—*i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine." *Id.* at 8a.

Having complied with this Court's instruction to reconsider its decision in light of *Atherton*, the court of appeals briefly disposed of several additional arguments raised by the parties on remand. Pet. App. 8a n.6. The court rejected (*ibid.*) petitioners' argument that a congressional intent to displace *D'Oench* could be inferred from the enactment of 12 U.S.C. 1823(e) in 1950, finding "no indication" of any such intention. Similarly, the court rejected petitioners' argument based on the 1989 enactment, as part of FIRREA, of 12 U.S.C. 1821(d)(2)(H), which requires the FDIC as receiver to "pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." On that point, the court "agree[d] with the FDIC * * * that § 1821(d)(2)(H) does not indicate a congressional intent to displace the *D'Oench* doctrine," but rather "assumes that the claims in question are valid and addresses only the manner in which valid claims are to be paid." Pet. App. 9a n.6. The court noted (*ibid.*) the then-recent issuance by the FDIC's Board of Directors of a policy statement concerning the interpretation of 12 U.S.C. 1821(d)(9)(A), also enacted by FIRREA, and remarked that if the position expressed in that statement were correct, then the FDIC would prevail in this case without regard to whether or not FIRREA displaced *D'Oench*. Finally, the court declined to address the FDIC's position on the retroactivity of any relevant provisions of FIRREA, because it concluded that *D'Oench* in any event survived the enactment of FIRREA and bars petitioners' claims. Pet. App. 10a n.6.

ARGUMENT

1. All of the events giving rise to the underlying state-law claims that petitioners seek to pursue in this case took place before the enactment of FIRREA in August 1989. See Pet. 5-7. Petitioners do not contend in this Court that the court of appeals erred in holding (96-106 Pet. App. 28a-53a) that the *D'Oench* doctrine, as applied before FIRREA, would bar maintenance of those claims against the FDIC as receiver for a failed bank, or that that question would merit this Court's review. They argue instead (Pet. 14-22) that the Court should grant review to resolve a conflict in the circuits concerning whether FIRREA's amendment of 12 U.S.C. 1823(e) and addition of 12 U.S.C. 1821(d)(9)(A) had the effect of wholly displacing the common-law *D'Oench* doctrine.[2] Compare Pet. App. 8a, 96-106 Pet. App. 14a-28a, and *Young* v. *FDIC*, 103 F.3d 1180 (4th Cir.), cert. denied, 118 S. Ct. 329 (1997), with *DiVall Insured Income Fund Ltd.* v. *Boatmen's First Nat'l Bank*, 69 F.3d 1398 (8th Cir. 1995), and *Murphy* v. *FDIC*, 61 F.3d 34 (D.C. Cir. 1995); see also *Ledo Financial Corp.* v. *Summers*, 122 F.3d 825, 829 & n.2 (9th Cir. 1997) (holding that, on given facts, *Atherton* and *O'Melveny* precluded application of *D'Oench* doctrine), petition for reh'g pending (filed Oct. 3, 1997).[3]

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[2] FIRREA's amendments are discussed, and the present statutory language is set out in pertinent part, in the FDIC policy statement discussed below and reprinted in the Appendix to this brief. See App., *infra*, 3a-4a; see also 96-106 FDIC Br. in Opp. 5-6.

[3] The FDIC's petition for rehearing in *Ledo* seeks revision, by the panel or the full court, of the panel majority's conclusion that it could properly conclude, without "overruling" *D'Oench*, that *O'Melveny* and *Atherton* led to the conclusion that there

As we explained in our brief in opposition to petitioners' first petition, however, this case does not present that issue. 96-106 FDIC Br. in Opp. 14-18; see also FDIC Br. in Opp. in *Young* v. *FDIC*, No. 97-65, at 6-8 (cert. denied, 118 S. Ct. 329 (1997)). Whether or not FIRREA supplanted *D'Oench* completely with respect to defenses or claims based on unwritten agreements allegedly entered into after FIRREA's enactment, it cannot be said to have supplanted the previously existing common law with respect to defenses or claims, like petitioners', based on alleged unwritten agreements predating FIRREA. The relevant statutory provisions added or amended by FIRREA, 12 U.S.C. 1821(d)(9) and 1823(e) (as amended), do not govern transactions that occurred before they were enacted.

As the FDIC explained in a Statement of Policy issued in February 1997, 62 Fed. Reg. 5984 (reprinted at App., *infra*, 1a-8a), no provision of FIRREA addresses the temporal reach of new Section 1821(d)(9) or amended Section 1823(e), and application of those provisions to agreements made before the statute was enacted would alter the rights that the parties to

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was no longer a sufficient federal interest to apply the common law rule to pre-FIRREA transactions. See also *RTC* v. *Kennelly*, 57 F.3d 819, 822 n.3 (9th Cir. 1995) (dictum) ("There is serious doubt whether *D'Oench, Duhme* survives *O'Melveny & Myers* v. *FDIC*."); but see *Murphy* v. *FDIC*, 38 F.3d 1490, 1500-1501 (9th Cir. 1994) (en banc) (accepting FDIC's concession that relevant FIRREA amendments could not be applied retroactively). The Ninth Circuit has not decided a case applying the FIRREA amendments to post-FIRREA transactions.

those agreements possessed when they acted.[4] Under the principles articulated by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994), Congress is therefore presumed to have intended for those provisions to apply only with respect to agreements made after the enactment of FIRREA. See App., *infra*, 6a-7a. Agreements made before that time, including the purported agreements or representations on which petitioners rely (see Pet. 6-7), are subject to pre-FIRREA law, including the federal common law then well established under *D'Oench*.[5]

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[4] Before FIRREA, a borrower could assert an affirmative claim against the FDIC, or a defense against the FDIC as receiver, based on a written agreement that failed to meet the contemporaneous-execution, approval, and recording requirements of Section 1823(e), so long as the borrower had not lent himself to an arrangement or scheme likely to mislead bank examiners. *D'Oench*, 315 U.S. at 460. For example, a borrower might rely on a written agreement executed by the bank's president and kept in its files, but not approved by its board of directors or loan committee. Application of Section 1821(d)(9) and the expanded version of Section 1823(e) (as amended by FIRREA) would retroactively eliminate that right.

[5] If Section 1821(d)(9)(A), which was added by FIRREA, did apply to this case, it would bar petitioners' claims. That Section provides in pertinent part that "any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim against the [FDIC as] receiver or the [FDIC in its corporate capacity]." See App., *infra*, 4a-5a (discussing applicability of Section 1821(d)(9)(A) to purported liabilities of a failed institution). Petitioners do not claim that Southeast Bank's alleged agreement to "conduct periodic audits [of petitioner Hess's business] and contact [petitioner] immediately upon discovering" improper sales (Pet. 6) met any of the

Petitioners argue (Pet. 20-21) that a *Landgraf* analysis is inapposite in this case because the issue is "whether to *fashion* a common law rule" (Pet. 21) (emphasis added). That is not correct. As the court of appeals emphasized (Pet. App. 5a-6a), the issue before that court in this case was not, as in *Atherton* or *O'Melveny*, "whether [to] *create* federal common law" (*id.* at 6a), but rather whether to apply a well established body of federal common law to the facts of the case, in light of a claim that statutory changes enacted after the completion of the primary conduct at issue should be held to have "displaced" the common-law rule. The logical first step in addressing *that* claim is the retroactivity analysis set out above, and the correct conclusion is that any "displacement" claim is not properly presented on the facts of a pre-FIRREA case.[6]

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requirements enumerated in Section 1823(e). See also 96-106 FDIC Br. in Opp. 19-22.

[6] The same analysis disposes of petitioners' argument (Pet. 22-28) that the decision below reflects some "lack of clarity" or "confus[ion]" (Pet. 23) concerning the relationship between this Court's decisions in *O'Melveny*, *United States* v. *Texas*, 507 U.S. 529 (1993), and *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). As the court of appeals lucidly explained (Pet. App. 4a-6a, 8a), the difference is that cases like *Texas* (and *Milwaukee*) involve determining whether a new statute should be deemed to abrogate *old* common law, while cases like *O'Melveny* (and *Atherton*) involve determining whether it would be appropriate under particular circumstances to create *new* common law. As we argue in the text, we think this case is most easily resolved on retroactivity grounds, obviating any need to reach the "displacement" question. Having chosen to address the "displacement" question, however, the court of appeals considered it within the correct analytical framework, and reached the correct result.

In any event, even if the *D'Oench* doctrine's application to transactions preceding FIRREA were open to serious question, the matter would not warrant this Court's review. Cases involving oral agreements or representations allegedly made in connection with such transactions comprise a finite set that is rapidly diminishing over time, and the FDIC's recent policy statement makes clear that the FDIC will not assert the common-law *D'Oench* doctrine in cases involving post-FIRREA transactions. See App., *infra*, 7a-8a. Whether the doctrine continues to apply in pre-FIRREA cases is therefore a question of little continuing importance.[7] Petitioners' remaining argu-

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[7] With the possible exception of the FDIC's pending en banc petition in *Ledo Financial*, the FDIC is aware of no case pending in a court of appeals, and of only one case pending in a district court, involving the possible application of *D'Oench* to pre-FIRREA facts that might arguably not be covered by the FIRREA amendments. The primary dispute concerning the coverage of those amendments is whether new Section 1821(d)(9)(A) applies only in cases that involve an identifiable bank "asset." Compare, *e.g.*, Pet. 22 & n.13 with App., *infra*, 4a-6a. Petitioners' suggestion (Pet. 19 & n.10) that the question presented here continues to arise frequently, based on a count of Westlaw citations in recent years, is unpersuasive. First, petitioners' case-count does not distinguish "asset" cases, which are far more common, from the relevant "no asset" cases. Moreover, the FDIC informs us that, over the period petitioners measure, the total number of appellate decisions involving either Section 1823(e) or *D'Oench* fell from 16 in 1994 to five in 1997. Of those five, only *Ledo* and *Young* arguably involved displacement of the common law by FIRREA. Compare *First Union Nat'l Bank of Florida* v. *Hall*, 123 F.3d 1374 (11th Cir. 1997) (counterclaim raised as defense to a suit to collect on an asset acquired from the FDIC), petition for cert. pending, No. 97-1296 (filed Jan. 28, 1998); *Duraflex Sales & Serv. Corp.* v. *W.H.E. Mech. Contr.*, 110 F.3d 927 (2d Cir.

ments (Pet. 22)—that the Eleventh Circuit might decline to accept the FDIC's waiver of reliance on *D'Oench* in some future case, or that legitimate disputes may arise concerning the proper interpretation of the FIRREA amendments in a case to which they apply—amount to little more than an attempt to characterize this case as a suitable vehicle to resolve, in advance, issues that may or may not arise in future litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1998

1997) (decided under state law); *Carpenter* v. *FDIC (In re Carpenter)*, 205 B.R. 600 (B.A.P. 9th Cir. 1997) (decided under Section 1823(e)).

APPENDIX

62 Fed. Reg. 5984

FEDERAL DEPOSIT INSURANCE CORPORATION

Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arraignments of a Depository Institution Prior to Receivership

[Monday, February 10, 1997]

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* * * * *

Introduction

The protection of the FDIC against unrecorded agreements or arrangements between a federally-insured depository institution (institution) and third parties is among the most important, long-standing, and powerful protections afforded the FDIC acting in either its corporate liquidator capacity (FDIC/Corporate) or in its capacity as a receiver for a failed institution (FDIC/Receiver). This statement of policy is intended to inform persons doing business with an institution of the circumstances in which: (1) The statutory provisions (12 U.S.C. 1821(d)(9)(A), 1823(e)); and (2) the rule enunciated by the Supreme Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), will be asserted by the FDIC to bar certain agreements or arrangements entered into with the institution prior to receivership. Published as an

addendum are "Guidelines For Use of *D'Oench* and Statutory Provisions" (Guidelines), which are discretionary and evolving by nature but nevertheless will serve to moderate the circumstances in which the FDIC will exercise these protections. [*]

Background

More than fifty years ago, the Supreme Court in *D'Oench* first recognized a federal policy of protection FDIC/Corporate from unrecorded schemes or arrangements that would tend to mislead banking authorities. The Court articulated a rule of law prohibiting a party who had lent himself or herself to such a scheme or arrangement from asserting against the FDIC an unrecorded agreement. This rule of law, as it subsequently has been applied by the courts, is referred to as the "*D'Oench* doctrine".

In 1950, Congress enacted section 13(e), codified at 12 U.S.C. 1823(e) (section 1823(e)), as part of the Federal Deposit Insurance Act of 1950, ch. 967, Section 2[13](e), 63 Stat. 899 (81st Cong., 2d Sess. 1950). The strict approval and recording requirements of section 1823(e) supplemented the protection afforded by the *D'Oench* doctrine. In 1982, this section was reenacted by Congress as part of the Garn-St. Germain Depository Institution Act of 1982, Pub. L. 97-320, Section 113(m), 96 Stat. 1474. Both before and after 1982 the federal courts of appeals and federal district courts consistently construed section 1823(e) and the *D'Oench* doctrine in tandem.

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* The Guidelines referred to in the text are not reprinted here, but may be found at 62 Fed. Reg. 5985-5988.

In August 1989, as part of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), Public Law 101-73, 103 Stat. 183, Congress expanded section 1823(e) to cover defenses raised against the FDIC in its receivership capacity, the newly created Resolution Trust Corporation (in its corporate and receivership capacities) and bridge banks. In relevant part, section 1823(e) now provides:

No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—

(A) Is in writing,

(B) Was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) Was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) Has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. 1823(e)

In addition, FIRREA added a new provision, section 11(d)(9)(A) (codified at 12 U.S.C. 1821(d)(9)(A) (section 1821(d)((9)(A)), which states, in relevant part, that "any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim

against the receiver or the [FDIC in its corporate capacity]."

In the FDIC's view, Congress intended that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, subject to the Guidelines,[1] these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine.

More specifically, the statutory definition of the scope of agreements to which section 1823(e) applies—*i.e.*, those agreements "which tend[] to diminish or defeat the interest of the [FDIC] in any asset acquired by it" (section 1823(e))—is *not* a "requirement" that section 1823(e) imposes on those agreements, which if not "met" renders section 1821(d)(9) inapplicable. There is no reason to suppose that Congress intended the scope of section 1821(d)(9)(A) to be coextensive with that of section 1823(e).

Section 1823(e) applies only with respect to agreements that pertain to assets held by the FDIC because the function of that section is to bar certain defenses to the FDIC's collection on such assets. Section 1821(d)(9)(A)'s function, in contrast, is to bar certain affirmative claims against the FDIC. It does so in order to affect primary conduct by providing an incentive for parties contracting with institutions to document their transactions thoroughly. That in turn: (1) Allows federal and state bank examiners to

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[1] The Guidelines have been in effect since late 1994.

rely on an institution's records in evaluating its worth; and (2) ensures mature consideration of unusual banking transactions by senior bank or thrift officials and prevents the fraudulent insertion of new terms when an institution appears headed for failure. *Cf. Langley* v. *FDIC*, 484 U.S. 86, 91-92 (1987).

In interpreting the meaning of "agreement" in section 1823(e) prior to its amendment in 1989, the Supreme Court in *Langley* held that it would disserve the policies recognized in *D'Oench* to interpret section 1823(e) in a more restricted manner than *D'Oench* itself: "We can safely assume that Congress did not mean 'agreement' in section 1823(e) to be interpreted so much more narrowly than its permissible meaning as to disserve the principle of the leading case applying that term to FDIC-acquired notes." *Langley*, 484 U.S. at 92-93. In the same way, it would disserve the policies recognized in *D'Oench* and *Langley* to interpret section 1821(d)(9)(A) more narrowly than *D'Oench* has been applied in so-called no-asset cases.[2]

Nevertheless, as reflected in the Guidelines, the FDIC, as a matter of policy, will not seek to bar claims which by their very nature do not lend themselves to the enumerated requirements of sec-

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[2] Two courts of appeals have applied section 1821(d)(9)(A) in a more constricted manner. See *John* v. *RTC*, 39 F.3d 773, 776 (7th Cir. 1994); and *Thigpen* v. *Sparks*, 983 F.2d 644 (5th Cir. 1993). Both of these cases involved pre-FIRREA facts and, consequently, as discussed *infra*, sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) were inapplicable. Moreover, in any future case involving similar post-FIRREA facts, any decision to raise the statutory protections would have to be authorized pursuant to the Guidelines, which were not in use at the time these cases were litigated.

tion 1823(e). To that end, the FDIC will continue to assert the protections of the *D'Oench* doctrine and FIRREA (sections 1821(d)(9)(A), 1823(e)) only in accordance with the Guidelines.

The FDIC has also determined, after careful consideration, that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) cannot be applied retroactively to alleged agreements or arrangements entered into before the enactment of FIRREA on August 9, 1989. Following the Supreme Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the courts of appeals that have addressed the issue have concluded that sections 1821(d)(9) and 1823(e) (as amended by FIRREA) do not apply in cases where the transactions at issue occurred before FIRREA's enactment.[3]

No provision within FIRREA addressed the temporal reach of section 1821(d)(9) or section 1823(e) (as amended by FIRREA). If the courts were to apply those provisions to agreements made before the statute was enacted, that would alter the rights possessed by the parties to such agreements.[4] Under the principles articulated by the Supreme Court in *Landgraf*, Congress must therefore be presumed to

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[3] See *Oklahoma Radio Assocs.* v. *FDIC*, 987 F.2d 685, 695-96, *motion to vacate denied*, 3 F.3d 1436 (10th Cir. 1993); *Murphy* v. *FDIC*, 38 F.3d 1490, 1501 (9th Cir. 1994) (*en banc*) (noting FDIC's concession in that regard).

[4] Before FIRREA, a borrower could assert an affirmative claim against the FDIC or FSLIC, or a defense against FDIC/Receiver or the FSLIC, based on a written agreement that failed to meet the contemporaneous-execution, approval, and recording requirements of section 1823(e), so long as the borrower had not lent himself to an arrangement or scheme likely to mislead bank examiners. *D'Oench*, 315 U.S. at 460.

have intended for those provisions to apply only with respect to agreements made after the enactment of FIRREA.[5] Thus, because the statutory provisions establish "a categorical recording scheme" (see *Langley*, 484 U.S. at 95) and *D'Oench* is an equitable doctrine (*id.* 93-95), sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) cannot be applied retroactively.

Accordingly, the statement of policy announces that the FDIC will assert the *D'Oench* doctrine for pre-FIRREA claims to the extent section 1823(e) (as it existed prior to FIRREA) is inapplicable but the claim nevertheless runs afoul of the *D'Oench* doctrine. For claims that relate to agreements or arrangements entered into after the effective date of FIRREA, the FDIC will apply only sections 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) to bar claims not entered into in accordance with the enumerated requirements of section 1823(e) (as amended by FIRREA). In either case, these protections will be asserted only in keeping with the Guidelines.

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[5] The retroactivity of FIRREA, however, is not determined on an all-or-nothing basis. There is no "reason to think that all the diverse provisions of the [statute] must be treated uniformly for" purposes of the retroactivity analysis. *Landgraf* v. *USI Film Prods.*, 521 U.S. at 280, 114 S. Ct. at 1505. Moreover, "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270, 114 S. Ct. at 1499.

FDIC Statement of Policy

1. Because sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) do not apply to agreements entered into before the effective date of FIRREA (August 9, 1989), such agreements are governed by pre-FIRREA law, including section 1823(e) and the *D'Oench* doctrine.

2. Agreements made after the enactment of FIRREA are governed by sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA).

3. This statement of policy does not supersede the FDIC's Statement of Policy Regarding Treatment of Security Interests After Appointment of the FDIC as Conservator or Receiver of March 23, 1993 (58 FR 16833).

By order of the FDIC Board of Directors.

Dated at Washington, DC, this 4th day of February, 1997.

Federal Deposit Insurance Corporation.

Jerry L. Langley,
Executive Secretary.

* * * * *

Supreme Court, U.S.
FILED
APR 6 1998
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No. 97-1025

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID S. HESS, MOTORCITY OF JACKSONVILLE, LTD., AND MOTORCITY OF JACKSONVILLE, INC.,
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SOUTHEAST BANK, N.A., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONERS

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STATUTES

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The Eleventh Circuit began its *en banc* opinion by acknowledging that there is a deep and widening circuit split on the issue presented by this case: whether FIRREA "displaced the federal common law *D'Oench* doctrine." Pet. App. 3a. Notwithstanding the Eleventh Circuit's candid recognition that its position on this issue squarely conflicts with that of other circuits, the FDIC still opposes certiorari.

Indeed, the FDIC's litigating position promotes a profoundly cynical view of the law. The FDIC is prepared aggressively to litigate the *D'Oench Duhme* doctrine in any lower court and even to obtain the Solicitor General's approval to seek *en banc* review of every loss the FDIC suffers at the Circuit Court level. Thus, the FDIC has taken the position that this fundamental issue, which potentially affects every person who does any business with a bank or savings and loan and which has consumed hundreds of pages in the Federal Supplements and Federal Reporters, is sufficiently important to warrant full-court attention of every Circuit that rules adverse to the FDIC. Yet when the issue properly comes before this Court, the FDIC makes every conceivable effort to convince the Court not to decide the question. The reason is plain. Every day of delay provides the federal government with additional leverage against numerous litigants in the lower courts, who continue to feel the intense pressure of *D'Oench Duhme* to settle their claims against failed institutions on terms favorable to the federal government or its assignees. The government's litigating strategy simply belies its avowed view that "the government prevails when justice is done." The proper application of that principle in this case requires the Court to grant the petition.

The government essentially parades out the exact same arguments it unsuccessfully deployed the last time petitioners sought certiorari. Those arguments did not succeed then; the Court unanimously GVR'd in light of *Atherton* v. *FDIC*, 117 S.

Ct. 666 (1997). See *Hess* v. *FDIC*, 117 S. Ct. 760 (1997). And the arguments should fare no better now. Instead, the Court should set the case for plenary consideration and decide once and for all whether the evolving *D'Oench Duhme* doctrine remains viable in 1998 as the *en banc* Eleventh Circuit held or whether that hoary federal common law doctrine has expired as the Eighth, Ninth and D.C. Circuits have declared.

I. THE DECISION BELOW EXPRESSLY AND SQUARELY CONFLICTS WITH THE DECISIONS OF THE DISTRICT OF COLUMBIA AND THE EIGHTH AND NINTH CIRCUITS.

The FDIC concedes, as it must, that there is a conflict in the circuits on the issue presented by petitioners (Opp. 6). Nevertheless, the FDIC opposes certiorari on the ground that the conflict is not really implicated in this case because "[t]he relevant statutory provisions added or amended by FIRREA . . . do not govern transactions that occurred before they were enacted" and "[a]ll of the events giving rise to the underlying state-law claims that petitioners seek to pursue in this case took place before the enactment of FIRREA in August 1989." Opp. 6-7. Petitioners addressed this argument in their Petition (Pet. 20-21), and explained that this Court has long recognized that, in the area of federal common law, an intervening statute preempts the common law rule immediately. See *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 309-10 (1981); *Murphy* v. *FDIC*, 61 F.3d 34, 40 (D.C. Cir. 1995). The FDIC makes no attempt to rebut petitioners' analysis.

The FDIC's silence is mystifying because the *City of Milwaukee* rule is of fundamental importance, not a matter of mere convenience. To ignore what Congress has said in

response to a problem and to adopt a contrary rule as a matter of federal common law is simply inconsistent with a federal court's "commitment to the separation of powers . . . " *Murphy*, 61 F.3d at 40 (quoting *City of Milwaukee*, 451 U.S. at 315). Thus, the relevant inquiry is whether a federal court today is permitted to continue to tap into a "vast" and "evolving" common law in light of Congress's specific guidance on the issue presented in this case. That question is squarely posed in this case. Accordingly, the FDIC's retroactivity argument provides no basis to deny certiorari.[1]

Ultimately, the makeweight nature of the retroactivity argument is demonstrated by the fact that it wholly ignores the scope of the Eleventh Circuit's holding in this case. The FDIC

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[1] In any event, even if retroactivity were the relevant inquiry, the FDIC's position ignores 12 U.S.C. § 1821(d)(2)(H), which provides that all post-FIRREA *receivers* "*shall* pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." (emphasis added). This provision makes clear that Congress intended for the FDIC's protections to be limited to statutory defenses as of the date of enactment. *See* Pet. 21 n.12. To permit the FDIC to avoid liability to petitioners in 1998 does complete violence to the plain language of 12 U.S.C. § 1821(d)(2)(H).

Moreover, the FDIC's assumption that the date of the loan agreement is the relevant date for retroactivity purposes is doubtful. In *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994), this Court indicated that the date of the receivership (in this case, two years *after* the enactment of FIRREA) would be relevant. In addition, it would be anomalous, at best, to use the date of the loan agreement as the trigger for determining whether petitioners' rights are governed by FIRREA or by federal common law. At the time of the loan agreement in this case, petitioners simply entered into a contract with a solvent bank and could not have anticipated that their rights in the event of a breach would be governed by federal law at all or that they would have to litigate against the FDIC.

raised the retroactivity issue below and the court dismissed it as irrelevant because FIRREA did not displace the *D'Oench* doctrine:

> Finally, the FDIC has argued for the first time on remand that FIRREA cannot apply to this case because the alleged arrangement at issue occurred prior to FIRREA's enactment. . . . *Because we conclude that FIRREA did not displace the D'Oench doctrine*, and because we conclude that Motorcity's claims are *D'Oench*-barred, we need not delve into an analysis of whether FIRREA's application to this case would pose a retroactivity problem.

Pet. App. 10a n.6 (emphasis added). This language makes crystal clear that the Eleventh Circuit intends to apply the *D'Oench* doctrine to all claims -- both pre-FIRREA claims and post-FIRREA claims.

Indeed, the Eleventh Circuit's broad application of the *D'Oench* doctrine is demonstrated in *First Union Nat'l Bank* v. *Hall*, 123 F.3d 1374 (11th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3532 (U.S. Jan. 28, 1998) (No. 97-1296), which the FDIC largely ignores in its Opposition (Opp. 10 n.7). In *Hall*, a panel of the Eleventh Circuit applied the federal common law *D'Oench* doctrine to bar a counterclaim involving a specific asset of a bank, which had acquired the asset from the FDIC. *Hall* involved a pre-FIRREA loan agreement, but other events, such as the conduct that gave rise to the counterclaim, took place after FIRREA was enacted. The court of appeals, however, did not address any issue of timing or any other factual differences in holding that the *D'Oench* doctrine applied; it simply relied on the decision in this case. 123 F.3d at 1379.

Thus, *Hall* removes any doubt that the Eleventh Circuit broadly applies the *D'Oench* doctrine to protect the FDIC and its private successors-in-interest, regardless of whether the underlying transaction involves a specific asset of the bank and regardless of whether the relevant events took place before or after the enactment of FIRREA. Accordingly, the acknowledged circuit split is squarely raised in this case.

II. THE COURT SHOULD GRANT THE PETITION TO DECIDE THE PROPER RELATIONSHIP BETWEEN *UNITED STATES* V. *TEXAS*, AND *O'MELVENY* AND *CITY OF MILWAUKEE*.

Petitioners demonstrated that an independent ground for granting review in this case is that the decision below suggests that there is a lack of clarity in this Court's decisions concerning the relationship between federal common law and federal statutes. In particular, the relationship between this Court's decisions in *United States* v. *Texas*, 507 U.S. 529 (1993), *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and the line of cases including *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), has at least confused the Eleventh Circuit. Pet. 22-28.

The FDIC's only response to this argument is a conclusory footnote arguing that there is no such confusion because the difference is that *Texas* involves "determining whether a new statute should be deemed to abrogate *old* common law, while cases like *O'Melveny* (and *Atherton*) involve determining whether it would be appropriate under particular circumstances to create *new* common law." Opp. 9 n.6.

The FDIC does not cite any authority for this "distinction," and no such authority exists. To the contrary, this Court has

made clear that "old" federal common law cannot survive once Congress legislates in an area. *Murphy*, 61 F.3d at 40. When Congress enacts a comprehensive statute that addresses a particular subject, the statute "preempts" not only existing federal common law rules, but the entire field of judicial lawmaking as well. As this Court stated in *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 n.34 (1981), "once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law." Indeed, this Court has said that the need for federal courts to develop common law "disappears" once Congress enters a field. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 314 (1981) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears").

Moreover, even if federal courts could continue to apply a very specific federal common law rule after Congress has enacted a comprehensive statute, the FDIC's distinction between "old" common law and "new" common law is untenable. The Eleventh Circuit did not apply the rule of *D'Oench*. That rule is codified in 12 U.S.C. § 1823(e)(1). Instead, what the court of appeals applied was its vision of an ever-expanding *D'Oench* doctrine. In its first decision in this case, the *en banc* court described the common law *D'Oench* doctrine as "vast" and, more significantly, "evolving." No. 96-106 Pet. App. 24a-25a (emphasis added). Following remand, that court reinstated its prior decision, reaffirming its conclusion that Congress "intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine." Pet. App.

8a. Even though the court purported to distinguish *O'Melveny* and *Atherton* on the ground that those decisions addressed the issue of *creating* federal common law, Pet. App. 6a, the court of appeals did not establish any limit on its ability to apply the "vast" and "evolving" *D'Oench* doctrine.

In sum, the notion that there is a difference between creating a "new" common law rule after Congress has acted (which both sides agree is prohibited) and expanding an "old" common law rule (which the 11th Circuit and the FDIC apparently believe is permissible) means simply that the seemingly narrow rule of *United States* v. *Texas* swallows the much more sweeping principles of *City of Milwaukee* and its progeny. Perhaps the Court is prepared to cut back as violently on the latter doctrine as the FDIC proposes, even though the rule embodies core separation of powers principles, but at a minimum the issue warrants this Court's immediate review.

III. THE QUESTION PRESENTED IS AN IMPORTANT AND RECURRING ISSUE IN THE FEDERAL COURTS.

Petitioners demonstrated that the question of the viability of a federal common-law *D'Oench* doctrine is an important and recurring issue that arises in several federal court cases each month. Pet. 19.

The FDIC contends that this question does not warrant review because (1) cases involving so-called "pre-FIRREA" transactions are "of little continuing importance" since they "comprise a finite set that is rapidly diminishing over time"; and (2) cases involving so-called "post-FIRREA" transactions will not arise because "the FDIC's recent policy statement makes

clear that the FDIC will not assert the common-law *D'Oench* doctrine in cases involving post-FIRREA transactions." Opp. 10. Both arguments are completely makeweight.

With respect to cases involving what the FDIC has termed "pre-FIRREA" transactions, its assertion that these cases are "of little continuing importance" is astonishing because the Solicitor General has authorized the FDIC to seek rehearing and *en banc* review in every case the FDIC has lost, including most recently, *Ledo Financial Corp.* v. *Summers*, 122 F.3d 825 (9th Cir. 1997). As the FDIC noted in its Opposition, it is seeking review in *Ledo* of the panel's "conclusion that there was no longer sufficient federal interest to apply the common law rule to pre-FIRREA transactions." Opp. 6-7 n.3. The FDIC's position in *Ledo* that the question whether the *D'Oench* doctrine applies to "pre-FIRREA" transactions is of sufficient national importance to warrant *en banc* review by the Ninth Circuit wholly undermines its position in this case that the issue has limited prospective significance. It cannot be true that the issue is important whenever the FDIC loses, but unimportant if the FDIC wins.

With respect to cases involving what the FDIC has termed "post-FIRREA" transactions, the FDIC's Statement of Policy (reprinted in Appendix to Opp.), which declares that the FDIC will not assert the *D'Oench* doctrine as a defense in certain cases, will not prevent the issue from arising in future cases. The FDIC typically transfers the assets that it acquires through receiverships to other entities, which stand in the FDIC's shoes for purposes of claims concerning those assets. These transferees are not bound by the FDIC's recent policy statement, and will continue to assert the *D'Oench* doctrine, as they have in several cases already. In *Hall*, for example, First

Union National Bank (which had acquired Mr. Hall's note), rather than the FDIC, was the party that successfully invoked the *D'Oench* doctrine against Mr. Hall. Similarly, in *DiVall Insured Income Fund Ltd. Partnership* v. *Boatmen's First Nat. Bank*, 69 F.3d 1398 (8th Cir. 1995), Boatmen's National Bank (the FDIC's successor-in-interest) unsuccessfully asserted protection under the *D'Oench* doctrine because that court held *D'Oench* was preempted for all purposes. Thus, the self-imposed "restraint" embodied in the FDIC's Statement of Policy (which could be revoked at any time) does not reduce the need for the Court to resolve the conflict in the circuits.

The FDIC also questions the significance of the over 100 reported cases since this Court decided *O'Melveny* in which the FDIC or other federal successors have relied, at least in part, on the *D'Oench* doctrine. Pet. 19 and n.10. The FDIC notes that the majority of these cases involve the question "whether new Section 1821(d)(9)(A) applies only in cases that involve an identifiable bank 'asset,'" and suggests that these should not have been counted since the claims in this case (contract and tort claims against the bank) did not involve an identifiable bank asset. Opp. 10 n.7. This argument misses the point. The question whether the *D'Oench* doctrine has survived FIRREA is implicated in both the "asset" and "no asset" cases, particularly in the Eleventh Circuit. Thus, this case is an appropriate vehicle for the resolution of that issue, and that issue is litigated every day of the year. Indeed, the fact that this is a "no asset" case arguably makes it an even better vehicle for resolution of the *D'Oench* issue because it permits the Court to reach the question whether it is sound policy to distinguish between "asset" and "no asset" cases. See Petitioners' first Petition for Certiorari, at 26-28 (No. 96-106).

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At the end of the day, the question presented here is precisely the same as the question presented by petitioners almost two years ago. At that time the FDIC asserted identical arguments in favor of denying the petition. The Court rejected the FDIC's effort then and it should do the same today. If anything, the need for review by this Court is more acute now because the conflict among the courts of appeals has widened and deepened. Customers of banks and assignees of the FDIC both deserve a uniform rule by which to order their affairs and uniformity can only be obtained now from this Court.

CONCLUSION

For the foregoing reasons, and for those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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